

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**BRANDLON A. BIBLE**

Claimant

VS.

**WICHITA MARRIOTT**

Respondent

AND

**NEW HAMPSHIRE INSURANCE COMPANY**

Insurance Carrier

Docket No. 1,056,637

**ORDER**

**STATEMENT OF THE CASE**

Respondent and its insurance carrier (respondent) appealed the November 17, 2011, preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark. Dale V. Slape of Wichita, Kansas, appeared for claimant. Jon E. Newman of Wichita, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 17, 2011, preliminary hearing and exhibits thereto; the transcript of the September 9, 2011, discovery deposition of Brandlon A. Bible and exhibit thereto; and all pleadings contained in the administrative file.

**ISSUES**

Claimant alleges that on April 21, 2011, he fell down three or four stairs while working for respondent and injured both knees. Dr. Robert L. Eyster recommended that claimant have a total knee replacement of both knees and scheduled claimant for a left total knee replacement on August 17, 2011, but respondent's insurance carrier refused to authorize the surgery. At the preliminary hearing, claimant requested medical treatment for both knees. Temporary total disability benefits were not requested, as respondent was providing claimant with accommodated work.

Respondent denied that claimant met with personal injury by accident arising out of and in the course of his employment. Respondent requests review and argues the ALJ exceeded his jurisdiction in finding that the medical treatment – arthroscopic surgery and/or bilateral total knee replacements – is reasonable and necessary medical treatment for claimant's work-related knee injuries. Respondent asserts that claimant's knee problems are causally related to and the natural consequence of his pre-existing nonoccupational conditions and are not work related.

The ALJ found claimant met with personal injury by accident arising out of and in the course of his employment with respondent. The ALJ stated in his Order:

The Claimant was injured out of and in the course of his employment on April 21, 2011, injuring both knees by aggravating a pre-existing condition.

The law of the State of Kansas, in effect on April 21, 2011, is that a work related aggravation of a pre-existing condition is compensable.<sup>1</sup>

The ALJ then authorized Dr. Eyster as claimant's treating physician and ordered respondent to pay all of claimant's medical bills.

Respondent raises three issues on appeal in its brief: (1) Did claimant suffer injuries to both knees on April 21, 2011, that arose out of and in the course of his employment with respondent? (2) Are claimant's accident, injuries, current symptoms and/or need for treatment causally related to or a natural and probable consequence of his pre-existing or nonoccupational conditions? (3) Did claimant suffer, at most, a temporary aggravation of pre-existing or nonoccupational conditions and/or is the need for treatment, if any, causally related to or a natural and probable consequence of his pre-existing or nonoccupational conditions?

The second and third issues raised by respondent are similar in nature. This Board Member will consider the following issues:

1. Does the Board have jurisdiction to review this matter? Respondent alleges the Board has jurisdiction to review this matter because the ALJ exceeded his jurisdiction by ordering medical treatment for injuries that were not causally related to claimant's fall on April 21, 2011. Respondent also argues that whether a claimant suffered a personal injury arising out of and in the course of his employment is jurisdictional and subject to review by the Board pursuant to K.S.A. 44-534a(a)(2).

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<sup>1</sup> ALJ Order (Nov. 17, 2011) at 1.

2. Did claimant suffer injuries to both knees on April 21, 2011, that arose out of and in the course of his employment with respondent? In its brief, respondent asserts that when claimant fell, he was engaged in a normal day-to-day living activity.

3. Is claimant's need for the medical treatment recommended by Dr. Eyster causally related to the injuries suffered by claimant in the accident on April 21, 2011? Respondent presented evidence that claimant had problems with his lower extremities dating back to 1992, when x-rays at the Long Beach Veterans Administration Hospital of claimant's knees revealed fractures of the left and right proximal fibulas. Respondent contends claimant's knee injuries are not causally related to claimant's fall on April 21, 2011, but were the result of pre-existing or nonoccupational conditions. Respondent asserts that, at most, claimant suffered contusions to his knees which would be only a temporary aggravation of pre-existing conditions to both knees.

#### **FINDINGS OF FACT**

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant was a loss prevention officer for respondent. His duties were patrolling the parking lot, securing doors, assisting guests, answering noise complaints, cleaning toilets, engineering duties, bellman duties, shuttle man duties, room service duties and concierge duties. Claimant worked the third shift from 11:00 p.m. to 7:00 a.m. One of claimant's duties is to take bills for guests staying at the hotel and slide the bills underneath the doors of guests' rooms. He starts at the top floor of the hotel and works his way down.

At approximately 3:00 a.m. to 3:20 a.m. on April 21, 2011, claimant had a stack of bills in one hand and was going from the 10th floor to the 9th floor or from the 11th floor to the 10th floor when he fell. His other hand was on the handrail. As claimant was proceeding down the stairs, his foot slipped, causing him to fall. Claimant estimated that when he fell, he was three or four steps from the bottom. Claimant fell to the bottom of the stairs and landed on both knees. Claimant testified that before the fall he was not dizzy and he is not sure whether a knee gave out before the fall.

Claimant immediately experienced pain in his knees, but continued to work. After he finished delivering the bills, claimant took some pain medication and told Derrick Elvins, whom claimant identified as the front desk manager,<sup>2</sup> about the fall. Claimant then drafted a memorandum as to how the accident occurred. The memorandum indicated the fall occurred between the 11th and 10th floors. Claimant testified that the next day he called his supervisor, Peter J. Dodash, and told him about the fall. Mr. Dodash allegedly told

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<sup>2</sup> Peter J. Dodash, respondent's night manager and director of security, identified Mr. Elvins as a night auditor.

claimant to see a doctor. When claimant contacted respondent's human resources director Marti Martin, she was gone on vacation. Consequently, claimant did not see a physician until May 23, 2011.

On February 17, 2010, claimant settled a workers compensation claim for a 2008 accidental injury to his right knee that occurred when claimant worked for BG Products. Claimant had surgery on the right knee, which he said "fixed the problem."<sup>3</sup> Claimant testified that after he recovered from surgery, he could run, ride his bike, chase kids down the hallway and do his job. As part of the settlement, claimant received approximately \$18,000.00 for the right knee injury. Claimant testified that prior to the fall on April 21, 2011, he had no problems with his left knee. Claimant also had a claim for an accidental injury to his back while working for BG Products in 2008. An award was entered in the back claim, which was later redeemed at the February 17, 2010, settlement hearing proceedings.

Claimant admitted that he previously had received treatment at the Veterans Administration (VA). When asked by respondent's counsel if he had been in a wheelchair in the past, claimant said he did not remember. Nor did claimant remember being hit by a motor vehicle during the 1980s. Claimant did recall being hit with a 2 x 4, baseball bat and being jumped by eight individuals. Claimant also remembered falling out of a truck while in the National Guard. Claimant testified that in 2004 he was an alcoholic and may have made up a story that he got hit by an automobile in order to attempt to get VA and Social Security disability benefits. Claimant testified he does not recall having left knee problems in 2004 or anytime in the past.

At the preliminary hearing, claimant was questioned at length about his medical history by respondent's counsel. Claimant adamantly denied ever having been in a motor vehicle accident and could not recall numerous accidents, injuries and medical problems that were contained in his medical records from 1992 through May 2005. He did recall seeking medical treatment in 2008 because of pain, tingling and numbness in the toes on both feet caused by diabetes.

Mr. Dodash, claimant's supervisor, testified at the preliminary hearing that he did not learn of claimant's accident until between seven and ten days after the accident, when he was informed of it by Derrick Elvins. Mr. Dodash testified claimant also notified him of the accident. Mr. Dodash asked claimant what happened and then inquired if any official paperwork had been completed.

Marti Martin testified that she first heard directly from claimant about the accident on May 23, 2011, when claimant left a telephone message requesting a doctor's appointment. She then made an appointment for claimant to see a doctor that morning.

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<sup>3</sup> Claimant's Depo. at 60.

Claimant testified that he contacted Ms. Martin's assistant, John Battles, the day after the accident and requested medical treatment, but he was told he would have to wait until Ms. Martin got back from vacation.

Claimant was seen by Dr. Daniel V. Lygrisse on May 23, 2011, for bilateral knee pain, with the pain worse in the right knee. Dr. Lygrisse is with Via Christi Occupational Medicine (VCOM). Claimant indicated to Dr. Lygrisse that the knee injuries occurred at work on April 21, 2011, while going down some stairs, tripping and falling and hitting both knees. X-rays were ordered which showed degenerative changes in both knees, with the degenerative changes more prominent on the right. The x-rays also showed old healed bilateral proximal fibula fractures. There was also a lesion in the right femoral diaphysis which was likely a bone infarct or a chondroid lesion. Dr. Lygrisse imposed temporary restrictions upon claimant and prescribed Motrin.

On May 27, 2011, claimant saw Dr. Jon P. Kirkpatrick, who is also with VCOM. He doubled the potency of claimant's Motrin prescription and ordered an MRI of claimant's right knee. Dr. Kirkpatrick's report indicated claimant had pain in both knees as a result of an injury at work, with pain worse in the right knee.

Claimant underwent an MRI of the right knee on June 21, 2011. The MRI disclosed tricompartmental degenerative changes and also a tear involving the posterior horn medial meniscus. There was also a questionable tear versus myxoid degeneration of the lateral meniscus posterior horn. Following the MRI, claimant was seen by Dr. Benjamin R. Norman at VCOM. He assessed claimant with bilateral knee pain after a fall and an abnormal MRI of the right knee including meniscal tears. Dr. Norman recommended that claimant be referred to an orthopedic specialist.

Claimant saw Dr. Robert L. Eyster, an orthopedic specialist, on July 11, 2011, for bilateral knee pain. Dr. Eyster was told by claimant of having no knee pain until his fall. Dr. Eyster's report from that visit states in part:

The patient was informed that his x-rays certainly look like he probably was about ready to develop symptoms in the knees at any time and may have even had some symptoms that he was able to cope with but did not realize it in the knees prior to the injury. The injury is obviously symptomatically an aggravating cause but the underlying degenerative condition is the prevailing problem in my opinion. The patient is very unlikely to improve with an arthroscopy procedure because of the amount of narrowing but that may be optional.<sup>4</sup>

Dr. Eyster injected both of claimant's knees with cortisone. However, the cortisone injections gave claimant no pain relief. On July 25, 2011, Dr. Eyster recommended bilateral total knee replacements, with the left knee to be done first. In his report from an

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<sup>4</sup> P.H. Trans., Cl. Ex. 1 and Resp. Ex. 2.

August 10, 2011, visit with claimant, Dr. Eyster stated: "His pain was aggravated by a fall on the knees."<sup>5</sup> That report also indicated the workers compensation insurance carrier was not going to pay for the scheduled left total knee replacement. Claimant again complained of severe bilateral knee pain when he saw Dr. Eyster on August 16, 2011. At that time Dr. Eyster indicated that bilateral arthroscopic surgery to smooth out and trim the meniscus and smooth the articular surface might give claimant short-term relief.

Respondent's attorney sent Dr. Eyster a letter dated September 20, 2011. The letter indicates numerous medical records of claimant were enclosed. Respondent also sent with the letter three questions on a separate document to Dr. Eyster with a space below each question for Dr. Eyster to check yes or no. Dr. Eyster answered yes to the question, "Are claimant's current bilateral knee symptoms and need for treatment, if any, a natural and probable consequence of his preexisting knee conditions?"; yes to the question, "Do you opine claimant suffered, at most, a temporary aggravation of a preexisting condition when he fell on 4/21/11, which has returned to its preexisting baseline condition?"; and no to the question, "Does claimant require treatment causally related to the 4/21/11 accident?"<sup>6</sup> The document was signed by Dr. Eyster and dated September 22, 2011.

At the request of respondent, claimant was examined by Dr. John P. Estivo, an orthopedic surgeon, on September 22, 2011. Dr. Estivo reviewed claimant's medical records dating back to 1992, including medical records from the VA and relating to claimant's 2008 knee injury while working at BG Products. His impressions after examination were that claimant had right and left knee contusions in relation to the fall on April 21, 2011, and pre-existing osteoarthritis to both knees unrelated to the fall. Dr. Estivo also indicated that the probable tear at the posterior horn of the medial meniscus in claimant's right knee was likely a degenerative type of tear. He also noted that claimant eventually may require knee replacements, but that would be completely unrelated to the April 21, 2011, fall. Dr. Estivo stated that claimant had reached maximum medical improvement with respect to injuries claimant suffered in the April 21, 2011, accident.

At the request of claimant's attorney, claimant saw Dr. John R. Babb, an orthopedic physician, on October 24, 2011. He reviewed claimant's medical records from Drs. Ahmed, Fluter, Do and Munhall which stemmed from claimant's 2008 work-related right knee accidental injury. Additionally, Dr. Babb reviewed the medical records generated by VCOM and Dr. Eyster subsequent to claimant's fall on April 21, 2011; Dr. Estivo's September 22, 2011, report; and right knee MRI and bilateral knee x-ray reports from before and after claimant's April 21, 2011, accident. After reviewing the foregoing medical records, obtaining a medical history from claimant and physically examining claimant Dr.

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<sup>5</sup> *Id.*, Cl. Ex. 1.

<sup>6</sup> *Id.*, Cl. Ex. 1 and Resp. Ex. 2.

Babb diagnosed bilateral knee pain with chondromalacia of the patella; right knee pain with tricompartmental osteoarthritis and recurrent medial meniscus tear; and left knee pain with possible meniscus tear. Dr. Babb opined that claimant had pre-existing right knee arthritis exacerbated by his April 21, 2011, work-related fall and that claimant's left knee pain was causally related to that fall at work. For the right knee, he recommended arthroscopy for chondroplasty and partial meniscectomy. If pain then continued, claimant should undergo a series of hyalagan injections. Dr. Babb stated that claimant would ultimately need a right total knee replacement, but that would be "under his [claimant's] private insurance."<sup>7</sup> He recommended an MRI of the left knee, with treatment of the left knee dependent on the MRI results.

#### PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.<sup>8</sup> Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.<sup>9</sup>

K.S.A. 2010 Supp. 44-501(a) in part states: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The Board's jurisdiction to review preliminary hearing findings is statutorily created by K.S.A. 44-534a. The statute provides the Board may review those preliminary findings pertaining to the following: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; (3) whether notice was given or claim timely made; and (4) whether certain defenses apply. The Board also has jurisdiction to review preliminary hearing findings pursuant to K.S.A. 2010 Supp. 44-551 if it is alleged the administrative law judge exceeded the judge's jurisdiction.

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<sup>7</sup> *Id.*, Resp. Ex. 2.

<sup>8</sup> K.S.A. 2010 Supp. 44-501(a).

<sup>9</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>10</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>11</sup>

### ANALYSIS

Respondent alleges the ALJ exceeded his jurisdiction by ordering medical treatment for injuries that were not causally related to claimant's fall on April 21, 2011. K.S.A. 2010 Supp. 44-551 grants the Board jurisdiction to review preliminary hearing findings where it is alleged that the ALJ has exceeded his or her jurisdiction.

The ALJ found claimant suffered injuries to both knees by accident arising out of and in the course of his employment with respondent. This Board Member concurs. The greater weight of evidence is that claimant fell down some stairs at work and injured both knees. Claimant testified how the accident occurred. His description of the accident to each physician he saw was consistent. Claimant told Derrick Elvins at the front desk about the accident immediately after the fall and then prepared a memorandum concerning the incident.

Respondent's argument that claimant's accident occurred while claimant was engaged in a normal day-to-day living activity is without merit. Claimant was delivering bills to hotel guests when he fell. That is a work activity, not an activity of day-to-day living. The exclusion of normal activities of day-to-day living from the definition of injury was an intent by the Legislature to codify and strengthen the holdings in *Martin*,<sup>12</sup> and *Boeckmann*.<sup>13</sup> But claimant's injury in this case is distinguishable from both *Martin* and *Boeckmann*. This Board Member concludes that the Legislature did not intend for the "normal activities of day-to-day living" to be so broadly defined as to include injuries caused or aggravated by the strain or physical exertion of work. In this case, claimant was injured by a fall at work while performing tasks associated with his employment. Claimant suffered personal injury by an accident that arose out of and in the course of his employment with respondent.

The pivotal issue in this claim is whether injuries claimant suffered as a result of the fall on April 21, 2011, resulted in the need for the treatment recommended by Dr. Eyster.

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<sup>10</sup> K.S.A. 44-534a.

<sup>11</sup> K.S.A. 2010 Supp. 44-555c(k).

<sup>12</sup> *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

<sup>13</sup> *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).



In *Ketterman*,<sup>14</sup> the respondent appealed the ALJ's preliminary order and asserted Ketterman's right knee arthritis pre-existed his work-related injury to his left knee and that the right knee arthritis was not aggravated or accelerated by Ketterman's left knee injury. The respondent argued the ALJ exceeded his authority by ordering the respondent to provide medical treatment, which included a right knee replacement. In *Morris*,<sup>15</sup> the claimant requested authorization for gastric bypass surgery in order to help relieve his back pain by losing weight. The respondent asserted the ALJ exceeded her authority by issuing a preliminary order that found the gastric bypass surgery was reasonable and necessary medical treatment for Morris' work-related back injury. In *Ketterman* and *Morris*, the Board Members reviewing the matters impliedly concluded the Board had jurisdiction to review the ALJs' preliminary orders requiring the respondents to pay for the medical treatments. Taking into consideration *Ketterman* and *Morris*, this Board Member concludes the Board has jurisdiction to review the issue of whether injuries claimant suffered as a result of the April 21, 2011, fall resulted in the need for the treatment recommended by Dr. Eyster.

Drs. Babb, Eyster and Estivo concur that claimant had pre-existing degenerative changes in his knees. Drs. Eyster and Estivo indicated that the treatment recommended by Dr. Eyster is causally related to the degenerative changes in claimant's knees that existed before claimant's fall. Dr. Estivo had claimant's medical records extending back to 1992. Dr. Babb reviewed medical records from claimant's 2008 accident; the records of Dr. Eyster and VCOM following claimant's fall on April 21, 2011; Dr. Estivo's September 22, 2011, report; and pre- and post-accident MRI and x-ray reports. Most convincing is Dr. Eyster's negative response when asked the following question by respondent's counsel, "Does claimant require treatment causally related to the 4/21/11 accident?"<sup>16</sup> Simply put, claimant has not met his burden of proof, by a preponderance of the evidence, that the medical treatment recommended by Dr. Eyster was causally related to claimant's fall at work on April 21, 2011.

Claimant did temporarily aggravate a pre-existing bilateral knee condition and was in need of medical treatment as a result of that temporary aggravation. Therefore, this Board Member affirms that part of the ALJ's Order requiring that respondent pay claimant's medical treatment.

### **CONCLUSION**

1. The Board has jurisdiction to review this matter.

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<sup>14</sup> *Ketterman v. City of Lawrence*, No. 1,030,872, 2008 WL 3280301 (Kan. WCAB July 22, 2008).

<sup>15</sup> *Morris v. Creekstone Farms Premium Beef*, No. 1,053,851, 2011 WL 4011683 (Kan. WCAB Aug. 31, 2011).

<sup>16</sup> P.H. Trans., Cl. Ex. 1 and Resp. Ex. 2.

2. Claimant suffered bilateral knee injuries arising out of and in the course of his employment with respondent as a result of a fall on April 21, 2011.

3. Claimant has not met his burden of proof by a preponderance of the evidence that the medical treatment recommended by Dr. Eyster was causally related to the fall at work on April 21, 2011.

4. This Board Member affirms the ALJ's ruling that all medical is ordered paid.

**WHEREFORE**, the undersigned Board Member affirms in part and reverses in part the November 17, 2011, preliminary hearing Order entered by ALJ Clark. This Board Member affirms the ALJ's finding that claimant suffered bilateral knee injuries arising out of and in the course of his employment with respondent on April 21, 2011. This Board Member reverses that part of the preliminary hearing Order that authorizes Dr. Eyster as claimant's treating physician. This Board Member affirms the ALJ's ruling that all medical is ordered paid.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February, 2012.

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THOMAS D. ARNHOLD  
BOARD MEMBER

c: Dale V. Slape , Attorney for Claimant  
Jon E. Newman, Attorney for Respondent and its Insurance Carrier  
John D. Clark, Administrative Law Judge